son (1911, Ct. Err.) 81 N. J. L. 497, 79 Atl. 278. But in some states no punitive damages are allowed, and there actual malice has been admitted, not as a ground for an arbitrary increase of compensatory damages, but in order to find the exact amount of the damage inflicted, since the plaintiff may in a particular case suffer greater distress by knowing that the words were spoken maliciously. *Burt v. Advertiser N. Co.* (1891) 154 Mass. 238, 28 N. E. 1; see also Odgers, *Libel and Slander* (5th ed.) 398. This doctrine, if properly safeguarded, appears sound on principle, but it is open to some practical objections. It is believed that in many cases the plaintiff would actually suffer less from knowing that the words were spoken from prejudice and ill-will rather than from sober conviction, and it is likely that in every such case the jury would award really punitive damages under the guise of compensation. This objection, however, is less forcible in a state which allows punitive damages, whether or not such damages are limited as they are in Connecticut, and granting that there is a real relation between malice and the amount of the damage suffered, the principal case seems logical in holding, in effect, that this element should not be excluded in measuring the compensation, merely because a further allowance may be made by way of punitive damages.

MARRIAGE AND DIVORCE—CEREMONY INVALID BECAUSE OF EXISTING IMPEDIMENT—COMMON LAW MARRIAGE ON REMOVAL OF IMPEDIMENT.—Believing her prior marriage in Russia to have been invalid, the defendant contracted a second with the petitioner; early in the course of their fourteen years' cohabitation as husband and wife, the defendant's first husband died. The second husband later sought annulment on the ground that the first marriage had been valid and subsisting at the time the second was celebrated. *Held,* among other reasons for sustaining the second marriage (1) that if the parties entered on the marriage in ignorance of an existing impediment, and cohabitated matrimonially both before and after the impediment was removed, they in law became husband and wife at once on its removal; and (2) that even if the second marriage was meretricious at the start, a new consent to a common law marriage would be found from continued cohabitation and declarations of the parties that they were husband and wife, after the removal of the impediment. *Schaffer v. Krestovnikow* (1917, N. J. Ch.) 102 Atl. 246.

The holding on the first point amounts to a declaration that a common law marriage exists under the circumstances stated. The essence of common law marriage is an agreement between the parties,—mutual consent in some manner to the relation of husband and wife. Bishop, *Marriage, Div. and Sep.* (6th ed.) sec. 218. Habit and repute are only evidence from which such agreement is inferred or presumed. *Ibid.*, sec. 434. In a case like the present the mutual consent to *enter upon* the marriage relation was clearly without effect when given: an impediment existed. After the impediment's removal no such consent was ever expressed, nor is there reason to presume it; persons who believe themselves married do not consent to *enter on* marriage. The "continuing consent" sometimes spoken of, so far as it means consent to enter on the relation, is wholly a fiction. To common law marriage, then, if the principal case is sound, the only agreement necessary is to *be*—not to *become*—husband and wife. This is also the necessary result of a previous New Jersey case, in which the marriage was held to become valid on the removal of the impediment, whether or not the parties knew of the removal. *Robinson v. Robinson* (1914, Ch.) 83 N. J. Eq. 150, 90 Atl. 311. This view has not always been taken. In *Collins v. Voorhees* (1890, Ct. Err.) 47 N. J. Eq. 555, 22 Atl. 1054, the court met the problem with cold logic: consent to cohabitation which followed a ceremony could, until something further appeared, be referred only to that ceremony; if

the ceremony was without effect, there was no marriage. *Accord, Cartwright v. McGown* (1887) 121 Ill. 388, 12 N. E. 737. In both the cases last cited, however, one of the parties was lacking in good faith at the outset, and *Collins v. Voorhees* has since been distinguished on that ground. *Robinson v. Robinson, supra.* But the real ground of the *Robinson* case, as of the principal case, seems to be that the ruling consideration is not logic, but a public policy which favors sustaining marriage whenever possible. This principle has been applied elsewhere to cases in which one or even both of the parties knew of the impediment at the beginning of the cohabitation. *Yates v. Houston* (1848) 3 Tex. 433, 450; *De Thoren v. Attorney General* (1876, H. of L.) 1 App. Cas. 686; *The Bread-albane Case* (1867) L. R. 1 H. L. Sc. 182. See also dissenting opinion in *Collins v. Voorhees, supra,* 47 N. J. Eq. 315, 20 Atl. 676. The holding on the second point in the principal case indicates a readiness, not perhaps to overrule *Collins v. Voorhees* in terms, but practically to abandon the distinction based on good faith at the outset, by finding a new consent on evidence hardly differing from that held insufficient in the earlier case. Since society is interested primarily in the marriage *status*—in the contract only as a definite entry upon that *status*—there seems to be no sound reason why, in states which recognize common law marriages, consent to *be,* rather than to *become,* husband and wife should not in all cases be sufficient to constitute the relation.

SALES—STATEMENT THAT GOODS HAD BEEN SHIPPED—WHETHER OR NOT A "WARRANTY."—The plaintiff sold a carload of apples to the defendant, and stated in a letter which was held to be a part of the contract that the apples had been shipped "yesterday." The plaintiff believed this statement to be true, but in fact the plaintiff's vendors, who were to make the shipment, did not forward the apples to the defendant until the next day. The defendant refused to accept the apples resting his refusal on the unfounded claim that they did not come up to the agreed weight. In an action for the price the defendant relied on the fact the apples were not shipped at the time stated. *Held,* that the defense must fail, both because the statement in question was made merely to identify the particular shipment, and the delay was an immaterial variation which gave no privilege of rejecting the goods, and because, if available at all, this objection was waived by failure to assert it immediately on learning the facts. *DeHoff v. Aspegren* (1917, App. T.) 166 N. Y. Supp. 1019.

In the case of a charter party a statement in the contract that the ship had sailed "three weeks ago" has been held to be a warranty and not a mere representation. *Ollive v. Booker* (1847) 1 Exch. 416; *accord, Oppenheim v. Fraser* (1876, Q. B. Div.) 34 L. T. Rep. N. S. 524 ("now at Rangoon"). A warranty has been defined, in effect, as a statement descriptive of the subject-matter or of some material incident, such as the time or place of shipment, equivalent to an express condition precedent, so that if found to be untrue in fact, it justifies the other party in repudiating the entire contract. See *Norrington v. Wright* (1885) 115 U. S. 188, 203; 6 Sup. Ct. 12, 14, and cases above cited. Whether such a statement is to be regarded as a warranty or a mere representation is treated as a question of construction, depending on the court's judgment of the materiality of the statement. In cases involving so-called "implied conditions" it is generally declared that time is presumptively of the essence in all mercantile contracts. See for example *Norrington v. Wright, supra; Salmon v. Boykin* (1887) 66 Md. 541, 7 Atl. 701. It is obvious that this rule, followed blindly, would often produce unjust results. In most of the cases decided under it, however, the delay was in fact substantial and serious; and it is to be hoped that the law will eventually reject the artificial theory of implied "conditions" where no condition is expressed, and treat the defense as depending simply on